ABDULLAH ZAWAWI OMAR

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
WAN SULEIMAN SCJ
SYED AGIL BARAKBAH SCJ
[CRIMINAL APPLICATION NO. 20 OF 1984]
8 JANUARY 1985

CRIMINAL LAW AND PROCEDURE: *Criminal breach of trust - Whether applicant dishonestly misappropriated the money - Unsatisfactory features in the trial - Whether defence should have been called - The extent of the right of the prosecution not to call every witness from whom a police statement has been taken.*

The applicant, the former manager of a FELDA Scheme, was charged and convicted of an offence of criminal breach of trust by a public servant under s. 409 of the Penal Code. His appeal to the High Court against the decision of the learned President was dismissed. The applicant then asked for leave under s. 66(1) of the Courts of Judicature Act to ask this question:

> Although the prosecution has the right not to call every witness from whom a police statement has been taken, the question is how far does that right extend?

The other issue is whether the applicant dishonestly misappropriated the money. The evidence showed that the key of the safe was returned to the applicant by the assistant manager a few days before the night when the money was found to be missing from the safe. Even though the applicant was the last person to leave the office that night, the Assistant Manager did return to the office to collect his work-book a short while after the applicant had left the office. The door of the safe was found to be open by the watchman while the door of the room was still locked. There was no sign of any breaking-in.

Held:

[1] There were some unsatisfactory features in the trial of the applicant showing that the case against him fell short of proof beyond reasonable doubt. These were:

(i) the key of the safe was in the possession of the Assistant Manager before it was returned to the applicant. No evidence was led as to whether there was actual or physical checking of money inside the safe by both of them;

(ii) no evidence was led as to how long the Assistant Manager stayed in the office on the night the money was found missing, and what he did there and whether he noticed anything unusual;

(iii) that the safe could be opened by a duplicate key;

(iv) there was no evidence as to whether all the windows of the building were locked that evening.

[2] In view of the above-mentioned unsatisfactory features, the defence should not have been called.

[3] The practice of making available a witness or witnesses from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus invoking the presumption of adverse inference under s. 114(g) of the Evidence Act. But where the prosecution's evidence falls short of proving a *prima facie* case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution's case.

[Applicant's conviction and sentence quashed.]

Legislation referred to:
Courts of Judicature Act 1964, s. 66 (1)
Evidence Act 1950, s. 114illus.(g)
Penal Code, ss. 21, 405, 409

For the applicant - James Ponniah; M/s. Stanley Ponniah, Ng & Soo
For the respondent - Fong Seng Yee; Senior Federal Counsel

JUDGMENT

Salleh Abas LP:

The applicant was the former manager of FELDA Scheme at Kampong LBJ, Labu (the Scheme). He came to the Scheme in 1973 having been transferred from Bukit Senawang Utara. As the manager of the Scheme, he took charge of the financial matters, maintained cash books and held the key to the safe which was in his office. On 1 November 1976 he was to go on transfer to Tanjong Malim and be succeeded by a new manager, Haji Hassan. As the handing over of responsibilities was not completed the applicant still remained at the scheme. However, prior to this between 25 October 1976 and 30 November 1976 he attended a course at the University Pertanian, Serdang.

The Scheme has an account with the Malayan Banking. On 3 November 1976 the applicant withdrew RM70,000 cash from the bank.

On 5 November 1976 the applicant was working late and did not leave the office until past 8.00 p.m. Omar bin Yahya, the watchman, testified that when he reported for duty that evening, at 6.00 p.m., he saw many people at the office, and that with permission of the applicant he went home to have a bath. When he came back to the office at about 8.00 p.m. he found the applicant's office still open and that the applicant was still in it. He heard a sound coming from the applicant's office as if a table was being dragged on the floor. At that time the door of the applicant's room was open, though its spring door was closed. After the dragging sound, lights were switched off, the door was locked and the applicant came out of his room and met the watchman. After five or six minutes' conversation between them the applicant left for his house and the watchman was left alone to guard the office. About half an hour later the watchman locked the office's main door and went to a coffee stall nearby. After having his coffee he returned to the office. About an hour later, assistant Manager Hamzah came into the office to collect his work-book and left. After Hamzah had left, the watchman again locked the main door, and went to the same coffee stall. When he came back an hour later, he opened the main door, went in and locked it from inside. Whilst inside the office he noticed that the phone which was located between the applicant's room and the general office was covered by a book. Access to the phone from the applicant's room was by means of a small opening of about 8" x 12" on the wall of the applicant's

room. The opening was so small that it was not possible for anyone to enter the room through it. However, suspecting that someone had entered the room, the watchman shone his torchlight into the applicant's room and there he saw the door of the safe open and the cement wall which held the cross bar securing the safe on the left side broken. The door of the room was nevertheless still locked, but one of the windows was open. He did not notice any of the windows open earlier during his trips to and from the office and the coffee stall.

On discovering this incident the watchman called the applicant who came and opened his office room with his own key and then examined the safe. After this, both went to the Police post at the Scheme to lodge a report.

Inspector Wan Abdul Ghany, PW4, the IO in the case visited the applicant's office-room the next day, on 6 November 1976, at 8.10 a.m. He did not see any sign of the breaking-in nor any sign of the safe being forced open. He also noticed that the wire-grills on top of the room was not forced open. In fact the safe could only be opened with its own key which was then being kept by the applicant. Some coins amounting to RM509.35 were found in the safe.

Adnan bin Mohd. Ali, PW10, who was an officer in the Treasury Division of FELDA Headquarters, Kuala Lumpur, said that upon examination of the financial records of the Scheme as on 6 November 1976, the amount of cash which the Scheme should have had was RM24,415.22 and that since there was only RM509.35, the shortage was RM23,905.87.

The conduct of the applicant on the night of 5 November 1976, as observed by the watchman, was that he was stunned and sad. Inspector Wan Abdul Ghany, the IO, gave evidence that the applicant was very concerned about a "Dumex" tin. In order to prevent it from falling into the police hands, he asked his wife to throw it away. Anyhow the police took possession of it and discovered cash RM3,000 hidden underneath uncooked rice in the tin.

The learned President found as a fact that this cash was not part of the missing money because it was satisfactorily explained by the applicant.

On the basis of this evidence the applicant was charged and convicted of an offence of CBT by a public servant for the sum of RM23,905.87 under s. 409 of the Penal Code and sentenced to 18 months' imprisonment. His appeal to the High Court was dismissed.

He came to us asking leave under s. 66(1) of the Courts of Judicature Act to determine four questions, which, his Counsel submitted, raise points of law of public importance and affect the outcome of his case.

There can be no doubt that the learned President was right in coming to the conclusion that the applicant was a public servant within the meaning of s. 21 of the Penal Code, and that he was entrusted with property or having dominion over it. The only issue that concerned the Court was whether there was a dishonest misappropriation of it. (s. 405 of the Penal Code).

As regards entrustment, there is ample evidence to prove it. As the manager of the Scheme the applicant was solely responsible for financial affairs of the Scheme and he personally kept and maintained cash books and also personally went to the bank to withdraw money and held the key to the safe where cash was being kept.

As regards proof of misappropriation this is a matter of inference from the evidence and circumstances. The money in hand on 6 November 1976 should have been RM24,415.22, but it was found to be RM509.35 only. So there was a shortage of RM23,905.87, which had to be accounted for.

The prosecution's case which was believed by the learned President was that the applicant himself took the money and that to cover his misdeed he faked a breaking-in.

The safe had two keys. One key was a key to the padlock which secured a cross-bar fastened to the safe. This key was at the material time in the possession of the chief clerk. The cement wall which held the cross-bar into which the padlock was fastened had broken off. The other key was the key which would open the door of the safe itself. This key was with the applicant. A lock-smith who gave evidence for the prosecution said that the safe door could only be opened with the key in the applicant's possession or with a duplicate key.

The question at the trial was whether the applicant faked the breaking-in of the safe. The prosecution said he did and this was accepted by the learned President. He must have held this view because the door of the applicant's office room was locked and the safe could only be opened with the safe key in his possession. If the applicant was the one who faked the incident it as an irresistable inference that he took the money in the safe and this would be proof of dishonest misappropriation. There have been a lot of cases like this where an accused person who could not account for the loss of the property under his care was held to be rightly convicted to CBT. On the other hand, if the applicant did not fake the breaking-in of the safe, i.e. he neither caused the cross-bar to fall off from its cement casing, nor opened the door of the safe with his key - there would be a doubt that he dishonestly misappropriated the money in it.

Thus the question in the ultimate analysis is whether someone else did the job or whether it was done by the applicant himself. The applicant did not give evidence on oath, but his statement from the dock did not differ from the evidence of the prosecution.

Looking at the questions for which leave for the reference was asked for, we are of the view that they all deal with questions of fact, and therefore, hardly qualify for the reference. However, upon examination of the records we find that there are some unsatisfactory features in the trial of the applicant showing that the case against him fell short of proof beyond reasonable doubt. These are:

Firstly, although during the last week of October 1976 the safe key was in the possession of the Assistant Manager and was only returned to the applicant on 1 November 1976, no evidence was led whether there was actual or physical checking of the money inside the safe by both of them, i.e. how much money was in the safe at the time when the key was handed over to the Assistant Manager, and how much was it when the key was returned to the applicant.

Secondly, despite the fact that the Assistant Manager went into the office building on the night of 5 November 1976 i.e., the night when the safe was broken into, no evidence was led to as to how long he stayed in the office building, and what he did there and whether he noticed anything unusual in that building.

Thirdly, there is an unchallenged evidence that the safe could be opened by a duplicate key and that duplicate key could be made and that the time during which the key was with the Assistant Manager was long enough for a duplicate key to be made, if he wished to make one.

These three matters could only be explained by the prosecution by calling the Assistant Manager himself. Instead, the prosecution chose to offer him to the defence, and the defence quite rightly declined to call him as its witness.

Fourthly, although all the windows of the office building were closed, after the breaking-in of the safe, one of the windows of the applicant's office room was found to be open. According to the evidence the responsibility of opening and shutting the windows was that of the office-boy. He was not called to explain whether he had bolted all the windows on that evening.

In view of these unsatisfactory features, the learned President should not have called upon the defence and likewise the learned Judge below should have allowed the appeal. However, at our suggestion Counsel for the applicant withdrew all the questions and substituted therefor the following question:

> Although the prosecution has the right not to call every witness from whom a police statement has been taken, the question is how far does that right extend?

We allowed leave to the applicant to deal with this question.

The practice of making available a witness or witnesses from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus invoking the often-quoted presumption of adverse inference under s. 114(g) of the Evidence Act. But where the prosecution's evidence falls short of proving *prima facie* case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution's case.

In the circumstances of this case, the Assistant Manager should have been called to explain those three matters and the office-boy to explain about the windows. It may well be that if these two were called, their evidence would be favourable to the prosecution, but unless they had given their testimonies, the Court could not be sure and should not indulge in conjectures and possibilities.

Thus, our answer to the question for which we granted leave should be that the prosecution's right not to call a witness from whom statements have been taken must always be guided by its duty to discharge the onus of proof.

Since the answer to the question affects the event of the applicant's appeal to the High Court we quashed his conviction and sentence.

Also found at [1985] 2 CLJ 2